Supplemental Brief for the United States

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Nos. 81-1304 and 81-1381

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

UNITED PARCEL SERVICE OF AMERICA, INC.,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE UNITED STATES POSTAL SERVICE

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Murphy v. *Hunt*, 455 U.S. 478 3

SEC v. *Sloan*, 436 U.S. 103 3

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 3

Time, Inc. v. *USPS*, 685 F.2d 760 2

Time, Inc. v. *USPS*, Nos. 81-4183 *et al.* (2d Cir. June 8, 1983) 1, 2, 3

Statutes and rule:

39 U.S.C. 3625(d) 2

39 U.S.C. 3625(e) 2

39 U.S.C. 3628 2

Sup. Ct. R. 35.5 1

Miscellaneous:

Further Explanation and Justification Supporting the September 29, 1981 Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services (Dec. 20, 1982) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1304

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

No. 81-1381

UNITED PARCEL SERVICE OF AMERICA, INC., PETITIONER

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Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of the United States Postal Service, respectfully moves for leave to file a supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Second Circuit in *Time, Inc.* v. *USPS*, Nos. 81-4183 *et al.* (June 8, 1983).*

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*We have lodged ten copies of the opinion in *Time* with the Clerk of this Court and have served copies on counsel for the other parties.

As we noted in our brief on the merits in this Court (Br. 11-12 n.14), the *Time* case was filed in the Second Circuit to review the Governors' September 29, 1981 decision to modify the Third Recommended Decision of the Postal Rate Commission. Among other changes, the Governors' September 29, 1981 decision abandoned the concept of Service-Related Costs ("SRC") and increased the price of a First-Class stamp to 20 cents. In an earlier opinion in the *Time* case, the Second Circuit held that the Governors had acted within their statutory authority in modifying the Commission's Third Recommended Decision. *Time, Inc.* v. *USPS*, 685 F.2d 760, 765-767 (2d Cir. 1982). The court of appeals concluded, however, that the Governors had not complied with the duty, imposed by 39 U.S.C. 3625(d) and (e), and 3628, to provide a reasoned explanation for the class-by-class modifications they made (685 F.2d at 769-773). It also found that although the Governors might reject the Commission's choice of a costing methodology, and hence its use of SRC, they could do so only where the Commission's methodology would not produce the revenue required to meet the Service's costs (*id.* at 773-775). The court thus remanded the case to the Governors. It said that the Governors could, "of course, stand by [their] modifications, in which case [they] will have to supply us with class by class explanations and [their] justifications for discarding the SRC concept" (*id.* at 775). The court retained jurisdiction to review the Governors' explanation (*id.* at 775 n.25).

In the most recent decision in *Time* the Second Circuit reviewed the Governors' *Further Explanation and Justification Supporting the September 29, 1981 Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services* (Dec. 20, 1982). With regard to the requested class-by-class explanations, the court concluded that the Governors had "identified sufficient evidence 'to explain the basis for the particular class by

class modifications and the rationale for the new interrelationships created' " (*Time, Inc.* v. *USPS, supra,* slip op. 16). While expressing reservations about the Governors' rejection of SRC, the court declined to rule on the merits of that issue for two reasons. The first was that the Governors had "another legitimate basis for modifying the PRC's *Third Recommended Decision*—the unlawful reduction by the PRC of the Postal Service's estimated revenue requirements" (*id.* at 12). The second was that "[t]he Supreme Court will soon resolve in [*National Association of Greeting Card Publishers* v. *USPS,* Nos. 81-1304 and 81-1381 (argued Dec. 1, 1982)] whether 39 U.S.C. § 3622(b)(3) * * * requires the PRC to use SRC in devising rates." *Time, Inc.* v. *USPS, supra,* slip op. 14.

The latest decision in *Time, Inc.* v. *USPS* does not moot this case. First, as we pointed out in our brief at the petition stage (USPS Br. 12), the Governors' modified rate schedule leaves in effect a number of the Commission's recommended rates and fees, including the fourth-class parcel post rates about which petitioner United Parcel Service complains. More important, as we also noted in our brief at the petition stage (*id.* at 9-11), the issue in this case is one that is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911). The rates challenged here—those in effect from March 22, 1981 to November 1, 1981 by virtue of the Governors' March 10, 1981 decision—were effective for too short a time to permit review in either the court of appeals or this Court. That result, as we pointed out at the petition stage (USPS Br. 9-10), has occurred before and is likely to recur. When it does, it is also probable that petitioners—who have participated in every general rate proceeding to date—will again be affected by the decision of the Governors. See *Murphy* v. *Hunt,* 455 U.S. 478, 482-483 (1982); *SEC* v. *Sloan,* 436 U.S. 103, 108-110 (1978).

For these reasons and the reasons stated in our principal brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

JUNE 1983

DOJ-1983-06

Docket Sheet

NO. 81-1304-CFX
Vide: 81-1381
81-1868

TITLE National Association of Greeting Card Publishers, Petitioner
v.
United States Postal Service, et al.

DOCKETED	COURT
Jan. 12, 1982	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Matthew S. Perlman
	Counsel for Respondents: Solicitor General, Robert A. Saltzstein, Raymond N. Shibley, Bernard G. Segal, William J. Olson, John M. Burzio, Alan R. Swendiman. (Over)
Jan. 12, 1982	Petition for writ of certiorari filed. (Record filed).
Jan. 12, 1982	Appendix filed.
Feb. 3, 1982	Order extending time to file a response to the petition until Feb. 24, 1982.
Feb. 5, 1982	Order extending time for respondent Dow Jones & Co., Inc. to file a response to the petition until Feb. 24, 1982.
Feb. 11, 1982	Order extending time for the Government to file a response to the petition until March 13, 1982.
Feb. 17, 1982	Order extending time for respondent Direct Mail/Marketing Association, Inc., to file a response to the petition until March 13, 1982.
March 9, 1982	Order further extending time for the Government to file a response to the petition until March 27, 1982.
March 23, 1982	Joint memorandum of respondents Dow Jones & Company, Inc., and Newsweek, Inc. in support of petition filed. (Vide: 81-1381).
March 26, 1982	Brief of respondent Direct Mail/Marketing Association, Inc. in opposition filed. (Vide: 81-1381).
March 26, 1982	Brief of respondent United States Postal Service in support of petition filed. (Vide: 81-1381).
Mar. 31, 1982	DISTRIBUTED. 4-16.
Apr. 19, 1982	Petition GRANTED. The case is consolidated with 81-1381 and a total of one hour is allotted for oral argument.

Apr. 29, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until July 2, 1982.
June 29, 1982	Order extending time to file the respondents' brief on the merits until Aug. 23, 1982.
July 2, 1982	Brief of petitioner National Association of Greeting Card Publishers filed. (Vide: 81-1381).
July 2, 1982	Joint appendix filed. (Vide: 81-1381)
July 2, 1982	Brief for intervenor Direct Mail/Marketing Association, Inc. filed. (Vide: 81-1381).
	(Over)

81-1304

Title

No.

DATE	PROCEEDINGS AND ORDERS
	Counsel for respondents cont'd: Toni K. Allen, Eli Davidson Minton, Dana T. Ackerly, Michael F. McBride David C. Todd, Ian D. Volner
July 8, 1982	Brief of petitioner United Parcel Service of America, Inc. filed. (Vide: 81-1381).
Aug. 18, 1982	Order further extending time to file the government's brief on the merits until Sept. 7, 1982.
Sept. 7, 1982	Brief for the United States Postal Service filed .(Vide: 81-1381)
Sept. 7, 1982	Brief for respondent Magazine Publishers Association, Inc., filed. (Vide: 81-1381)
Sept. 7, 1982	Brief for intervenor-respondents March of Dimes Birth Defects Foundation, et al. filed. (Vide: 81-1381)
Sept. 7, 1982	Brief of respondent Dow Jones & Company, Inc. filed. (Vide: 81-1381).
Sept. 7, 1982	Brief of respondent American Business Press filed. (Vide: 81-1381).
Sept. 7, 1982	Brief of respondents Newsweek Inc. and Time Incorporated filed. (Vide: 81-1381).
Sept. 7, 1982	Brief of respondents Recording Industry Association of America, et al. filed. (Vide: 81-1381).
Sept. 7, 1982	Brief of respondents Mail Order Association of America, et al. filed. (Vide: 81-1381).
Sept. 7, 1982	Motion of American Newspaper Publishers Association and National Newspaper Association for leave to file brief as amici curiae filed. (Vide: 81-1381).
Sept. 15, 1982	CIRCULATED.
Sept. 20, 1982	Motion of Direct Mail/Marketing Association, Inc. for leave to participate in oral argument filed.
July 15, 1982	Motion of petitioners for divided argument and for additional time for oral argument filed. (Also in 82-1381
Sept. 24, 1982	Opposition of Solicitor General to motion of Direct Mail/Marketing Association, Inc. for divided argument filed (Also in 81-1381).
Sept. 24, 1982	Opposition of petitioners to motion of Direct Mail/ Marketing Association, Inc. for divided argument filed. (Also in 81-1381).
Oct. 4, 1982	The motion of petitioner for divided argument is GRANTED. The request for additional time for oral argument is DENIED. The motion of American Newspaper Publishers Association, et al. for leave to file a brief as amici curiae is GRANTED. The motion of Direct Mail/Marketing Association, Inc. for leave for divided argument is DENIED.

(Card No. 2)

NO.	TITLE
81-1304-CFX (Vide: 81-1381)	National Association of Greeting Card Publishers, Petitioner v. United States Postal Service, et al.

DOCKETED	COURT
Jan. 12, 1982	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
Nov. 18, 1982	Reply brief of petitioner United Parcel Service of America, Inc. filed. (Vide: 81-1381). (D).
Nov. 19, 1982	Reply brief of petitioner National Association of Greeting Card Publishers filed. (Vide: 81-1381). (D).
Nov. 24, 1982	Reply brief for intervenor Direct Mail/Marketing Association, Inc. filed. (D). (Vide: 81-1381).
Dec. 1, 1982	ARGUED.
June 15, 1983	Motion of the Solicitor General for leave to file a supplemental brief after argument filed. (Also in 81-1381)
June 20, 1983	DISTRIBUTED. 6-23. (Above motion).
June 22, 1983	Adjudged to be affirmed and remanded by a unanimous Court.
June 27, 1983	The motion of the Solicitor General for leave to file a supplemental brief after argument is granted.